IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

NATIVE ECOSYSTEMS COUNCIL, a non-profit organization, ALLIANCE FOR THE WILD ROCKIES, a non-profit organization Plaintiffs, vs. FAYE KRUEGER, in her capacity as Regional Forester for the United States Forest Service, Region One, UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture, and UNITED STATES FISH & WILDLIFE SERVICE, an agency of the U.S. Department of Interior, Defendants.	CV 13–167–M–DLC ORDER

Following this Court's Order granting summary judgment in Defendants' favor, Plaintiffs, on July 1, 2014, filed a motion for a stay pending appeal, or motion for preliminary injunction, preventing implementation of the Millie Roadside Hazard Tree Removal Project. Ground-disturbing activities for the Project are expected to commence on July 20, 2014.

The Project authorizes removal of dead or dying burned "hazard trees" that

stand within 150 feet of certain existing roads in the Gallatin National Forest. The Project area is popular for recreation and is home to "existing high human development and activity." FS-A-1:1-2. The Project is designed to address the "immediate hazard" posed by the hazard trees, which are predicted to fall or roll on to the roads, thereby disrupting road use and potentially endangering users. *Id.* at 1-2. All told, the Project is estimated to affect approximately 300 acres of land alongside the roads. Plaintiffs challenge the Project under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Administrative Procedure Act. For the reasons explained, Plaintiffs' motion is denied.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. A petitioner seeking an injunction, whether it is an injunction pending an appeal or otherwise, must show that (1) it is likely to suffer irreparable harm absent a preliminary injunction, (2) that it is likely to succeed on the merits, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *Winter v. Natural Resource Defense Council*, 555 U.S. 7, 20 (2008). Petitioners seeking an injunction must show more than a possibility of irreparable harm. *Id.* at 22. Petitioners must demonstrate that "irreparable injury is *likely* in the absence of an injunction." *Id.* (emphasis in original). Once the petitioner shows that irreparable harm is likely, the other

factors are assessed on a sliding scale. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). For instance, if, after demonstrating likely irreparable harm, a petitioner also makes a strong showing on the public interest and equities prongs, then an injunction may issue so long as the petitioner raises "serious questions going to the merits." *Id.* A petitioner in such cases is thus relieved of the requirement that it demonstrate that it is likely to succeed on the merits, and may succeed on the lesser "serious questions" standard. *Id*. When the Federal government is a party, the balance of equities and public interest factors may be merged. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

In seeking an injunction, Plaintiffs here do not contend that the Project will irreparably harm any endangered or threatened species. Plaintiffs contend instead that their "interests in attempted viewing, studying, and enjoying grizzly bears and elk undisturbed in their natural surroundings" will be irreparably harmed by the Project's activities. (Doc. 39 at 8.) Plaintiffs offer no evidence that the Project is likely to disturb grizzly bears. Plaintiffs offer no evidence that the Project will harm lynx. Also, notably, Plaintiffs did not raise any objection to the Project related to elk at any previous stage of these proceedings and there has been no showing in this case that elk, or Plaintiffs' asserted interest in viewing elk, will be impacted by Project activities. Plaintiffs premise their asserted injury on its

"members' use and enjoyment of the Project area in its undisturbed state." *Id.* Plaintiffs ignore, however, the fact that all Project activities will occur either on existing roads or within 150 feet of existing roads – areas not generally associated with undisturbed nature. Plaintiffs further ignore the fact that the Project is designed to ensure continued and safe access to the Gallatin National Forest in order for people, like Plaintiffs, to recreate in the Gallatin National Forest. At best, Plaintiffs raise the faintest possibility that they will suffer irreparable harm absent an injunction. This is insufficient to warrant an injunction. *Winter*, 555 U.S. at 20. Plaintiffs fail to demonstrate a likelihood of irreparable injury absent an injunction. The Court need not inquire further, but will nonetheless provide an analysis of Plaintiffs' showing on the merits.

With respect to Plaintiffs' showing on the merits, Plaintiffs contend the Project violates the ESA by increasing road density beyond that allowed in the 2006 Gallatin Travel Plan's incidental take statement. This contention was squarely rejected by the Court's previous Order and Plaintiffs raise no new issues, nor point to any conflicting law on the subject.

Plaintiffs continue to misstate the administrative record regarding the Project, asserting that the Project will "open eight miles of roads that are currently closed." (Doc. 39 at 9.) Not so. All Project activities will occur on currently existing, motorized roads. Some of these roads are currently open to public

motorized use and others are open only for administrative motorized use. During Project implementation, the roads will be closed to public motorized use. They will be open only for the administrative purpose of removing the hazard trees. Thus, the Project will not increase road density and will not violate the incidental take statement.

The Project also will not affect secure habitat for grizzly bears. All Project activities will occur within 150 feet of existing motorized roads. Secure grizzly bear habitat exists, by definition, only in areas that are at least 500 yards from any existing roads.

With respect to lynx, Plaintiffs simply summarize the Court's June 4, 2014 Order and provide no comment or analysis as to why they are likely to succeed on the merits regarding lynx. Plaintiffs offer nothing to demonstrate that there are serious questions regarding the merits of the Court's Order.

Plaintiffs fail to demonstrate a likelihood of success on the merits. Plaintiffs also fail to meet the lesser burden of demonstrating that there are serious questions going to the merits.

Plaintiffs contend that the balance of harms and public interest tip heavily in their favor because they have alleged an ESA claim, citing *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024 (9th Cir. 2005). As explained above, however, Plaintiffs fail to raise serious questions going to the

merits of their ESA claims, and fail to demonstrate that irreparable harm is likely absent an injunction. *Winter* requires petitioners "to make a showing on all four prongs" of the injunction test. *Cottrell*, 632 F.3d at 1135. Thus, the Court need not discuss the balance of harms and public interest with respect to Plaintiffs' ESA claims.

Moreover, Plaintiffs fail to address the balance of harms or the public interest with respect to their NEPA or APA claims. Plaintiffs appear to argue that the scales tip in their favor simply because they have alleged an ESA claim. Plaintiffs fail to raise serious questions as to the merits with respect to their NEPA and APA claims and fail to demonstrate likely irreparable harm absent an injunction. Thus, the Court need not balance the equities or weigh the public interest. *Id.* For the sake of completeness, however, the Court notes that it perceives little, if any, damage to Plaintiffs' asserted interest in viewing grizzly bears or lynx in undisturbed nature by allowing this small roadside hazard tree removal project to go forward. Meanwhile, the interests of public safety are served, and certain economic benefits are gained, by allowing the Project to go forward.

For all the above reasons, and because there is a limited and diminishing window in which to reap any economic benefit from this Project, the Court also denies Plaintiffs' alternative request for a 21-day injunction.

Accordingly, IT IS ORDERED that the motion (Doc. 38) is DENIED.

DATED this 21st day of July, 2014.

Dana L. Christensen, Chief District Judge
United States District Court